

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH “E”: NEW DELHI**

**BEFORE  
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No.1691/Del/2022  
Asstt. Year: 2017-18

Mohammad Daud, 4248, Gali Shahtara, Ajmeri Gate, New Delhi – 110 006. PAN ASCPM5108R	Vs.	ITO, Ward-58(1) Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri G.S. Kohli, CA
Department by:	Shri Sumit Kumar Verma, Sr. DR
Date of Hearing:	22.03.2023
Date of pronouncement:	22.05.2023

**ORDER**

**PER ASTHA CHANDRA, JM**

The appeal filed by the assessee is directed against the order dated 09.06.2022 of the National Faceless Appeal Centre (“**NFAC**”), Delhi confirming the penalty of Rs. 1,50,000/- levied by the National Faceless Assessment Centre, Delhi under section 271B of the Income Tax Act, 1961 (**the “Act”**) for the Assessment Year (“**AY**”) 2017-18.

2. The grounds raised by the assessee are as under:-

- “1. *In the circumstances and facts of the case that the learned A.O’s order as well as CIT(Appeal)’s order are not justified in the eyes of law.*
2. *The humble appellant was not liable to have Tax Audit in view of Circular No. F.No.201/3/85-IT(A-II) dated 17/03/1986.*
3. *That the documents filed before the A.O during the course of proceedings evidently proves that the appellant provided the services only as courier and thus is not liable u/s 44AB of Income Tax Act, 1961.*

4. *That the certification filed by the appellant for the services rendered on behalf of the principal concern has not been considered by the CIT(Appeal) in appropriate manner and rather has also twisted the A.O.'s remark in his own manner.*
5. *That without prejudice to above the humble appellant got the Tax Audit u/s 44AB on insistence by the learned A.O. during the course of proceedings which has been accepted by the A.O. in respect of the profit declared and thus in these circumstances being the initial year and further not aware this proviso applicable the harsh step of imposition of penalty deserves to be overruled.”*

3. Briefly stated, the assessee is an individual engaged in retail trading of Amul Dairy Products like milk, paneer, ghee, curd, etc. on day to day basis. This is the first year of his business. He did not file his return under section 139(1) of the Act and even after initial issue of notice under section 142(1) of the Act through system on the ground that he had no knowledge of accounting and book writing. However, in response to notice under section 142(1) issued during the course of assessment proceedings, the assessee filed his return for AY 2017-18 on 23.10.2019 declaring income of Rs. 3,74,020/-. A copy of tax audit report dated 10.10.2019 was also submitted. Perusal thereof and details filed revealed that the assessee has declared turnover of Rs. 6.51 crores. The Ld. Assessing Officer (“AO”) completed the assessment vide order dated 29.12.2019 under section 144 of the Act accepting the income declared by the assessee in the return and initiating the penalty proceedings under section 271B of the Act for his failure to get his books of account audited by a qualified Chartered Accountant, thereby violating the provisions of section 44AB of the Act.

4. During penalty proceedings, show cause notices remain uncomplined with. Hence, the penalty of Rs. 1,50,000/- was imposed vide order dated 21.12.2021 under section 271B of the Act against which the assessee filed appeal before the NFAC, Delhi.

5. During the course of appellate proceedings, it was explained that the assessee is engaged in the business of supply of milk (Amul) on behalf of Gujarat Co.op Milk Marketing Federation Ltd. known as “Amul Milk” in the

assigned area and its daily proceeds were given to them via bank mode. It was stated that the daily proceeds received by the assessee was firstly deposited by him in bank account maintained by him from where he transferred such deposits to Principal, i.e. Gujarat Co.op Milk Marketing Federation Ltd. on that very day. The Ld. AO accepted the above mode and the declared income has also been accepted by him. It was contended that the assessee was providing the services and the receipts were not related to him, it was only on behalf of Principal concern from whom he was eligible to get fixed commission. Services were also restricted to assigned area. The certificate issued by the Principal concern was also filed. CBDT Circular No. F. No. 201/3/85/IT(A-II) dated 17.03.1986 was also relied upon. Without prejudice to the above, it was also submitted that it was the first year of business of the assessee who was absolutely not aware that section 44AB is applicable to him. There was no wilful default by him.

6. The explanation of the assessee was not acceptable to the appellate authority, i.e. the Ld. Commissioner of Income Tax (Appeals) (**"CIT(A)"**) who confirmed the impugned penalty observing as under:-

*"4.3 I have considered the matter. The assessee had advanced two-pronged argument in support of claim that penalty u/s 271B was not attracted in his case. First line of argument is that assessee was only acting as agent of AMUL and it was earning commission. But assessee had not given any concrete material in support of its claim. The certificate given by Gujarat Milk Marketing Federation (AMUL) did not specify that assessee was only an agent for marketing of their product. The assessee did not give any evidence showing that he was acting as commission agent only. In view of this, the assessee's stance that its accounts are not liable to audit u/s 44AB is not acceptable.*

*4.3.1 Second line of argument is that the previous year was the assessee's first year of business and since he was ignorant about the provision of law and that there was no wilful default. This argument is also not acceptable. The provision of section 44AB is very clear. If turnover exceeds certain prescribed limit, books of accounts are to be maintained and the same have to be audited by a Chartered Accountant. Audit report for the year was uploaded only on 10.10.2019. There was substantial delay in filing the audit report. Considering the facts of the case, I am of the belief that the case is fit for imposition of penalty u/s 271B of the Act."*

7. Aggrieved, the assessee is before the Tribunal and all grounds of appeal challenge the levy/confirmation of the impugned penalty.

8. The Ld. AR reiterated the same arguments which were advanced before the Ld. CIT(A). These are contained in para 4.2 of the Ld. CIT(A)'s order. He further submitted that the matter is covered in favour of the assessee by the order dated 03.03.2023 of the Co-ordinate Bench in the case of Mohd. Javed vs. ITO in ITA No. 916/Del/2022 for AY 2017-18, a copy of which appears at page 16-19 of the Paper Book. The Ld. DR however relied on the order of the Ld. CIT(A) and referred to para 4.3 and 4.3.1 of his order.

9. We have considered the submissions of the parties and perused the records. Section 271B provides that if any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnish a report of such audit as required under section 44AB, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half percent of the total sales, turnover or gross receipts; as the case may be, in business or the gross receipts in profession, in such previous year or years or a sum of one hundred fifty thousand rupees, whichever is less. However, no penalty shall be imposable on the person if he proves that there was reasonable cause for the failure as provided under section 273B of the Act.

10. During assessment proceedings as also before the Ld. CIT(A) in penalty proceedings the assessee explained, inter alia that it was his first year of business and that he was under the bonafide belief that the provisions of section 44AB of the Act was inapplicable to him as he was only a commission agent supplying milk on behalf of "Amul Milk" in the assigned area and was entitled to fixed commission only. In our opinion, the explanation offered by the assessee constitutes 'reasonable cause' and the assessee is eligible to the protection envisaged under section 273B of the Act.

11. It is an admitted position that during the course of assessment proceedings, the assessee got the tax audit done and submitted the tax audit report before the Ld. AO when he was made aware that initial receipts having been deposited by him in the bank account maintained by him necessitated tax audit as per the provisions of section 44AB. This factual position has altogether been ignored by the Ld. AO/CIT(A) and the impugned penalty has been levied/confirmed.

12. The contention of the assessee before the Ld. AO/CIT(A) has been that the assessee is only an agent of Amul. The assessment order passed on 28.12.2019 reveals that the assessee explained in detail the modus operandi of his business which after examination has been accepted by the Ld. AO. The assessee has submitted the copy of his account appearing in the books of M/s. Gujarat Co.op Milk Marketing Federation Ltd. at page 3-14 of the Paper Book which form part of the Certificate given by the said Federation that the assessee sold their milk and milk products in the assigned area implying thereby that the assessee was providing the services and acted only on behalf of his Principal for earning the fixed commission. This has not been appreciated in right perspective.

13. The explanation offered by the assessee has been discarded by the Ld. CIT(A) without any valid and cogent reasons. On the facts and in the circumstances of the case, following the decision in Mohd. Javed's case (supra), we hold that the impugned penalty is not sustainable which we hereby vacate.

14. In the result, the appeal of the assessee is allowed.

**Order pronounced in the open court on 22<sup>nd</sup> May, 2023.**

**sd/-**  
**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Dated: 22/05/2023

**Veena**

**sd/-**  
**(ASTHA CHANDRA)**  
**JUDICIAL MEMBER**

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi

Date of dictation	
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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
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Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
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